

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION**

**ESTATE OF LARRY HOSTETTER
and JENNIFER HOSTETTER,**

Plaintiffs,

V.

**ROBERT GILLOCK, Individually,
and CITY OF NOCONA, TEXAS,**

Defendants.



















Civil Action No. 7:17-cv-00006-O-BP

FINDINGS, CONCLUSIONS, AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Before the Court are Defendant City of Nocona's 12(b)(6) Motion to Dismiss Complaint (ECF No. 5) and Brief in Support (ECF No. 6), both filed February 3, 2017; and Defendant Robert Gillock's 12(b)(6) Motion to Dismiss Plaintiffs' Complaint (ECF No. 12) and Brief in Support (ECF No. 13), both filed February 14, 2017. United States District Judge Reed O'Connor referred this case to the undersigned for pretrial management by Order entered on February 24, 2017. ECF No. 17. A motion to dismiss is an enumerated dispositive motion to which the undersigned may only issue a recommendation to Judge O'Connor. 28 U.S.C. § 636(b)(1)(A). After considering the pleadings and applicable law, the undersigned **RECOMMENDS** that Defendants' Motions to Dismiss (ECF Nos. 5 and 12) be **DENIED** without prejudice as **MOOT**.

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, the Court granted Plaintiffs' unopposed motion to amend their complaint. Fed. R. Civ. P. 15(a); ECF No. 27. By filing Plaintiffs' Amended Complaint (ECF No. 28), Plaintiffs superseded their original complaint; therefore, Defendants' Motions to Dismiss should be denied as moot, without prejudice to

Defendants' right to refile.¹ *Thomas v. Duetsche Bank Nat. Trust Co.*, No. 3:12-CV-5014-M BF, 2013 WL 673988, at *1 (N.D. Tex. Jan. 21, 2013), *report and recommendation adopted*, No. 3:12-CV-5014-M BF, 2013 WL 673983 (N.D. Tex. Feb. 25, 2013); *see also Mangum v. United Parcel Servs.*, No. 3:09-CV-0385-D, 2009 WL 2700217, at *1 (N.D. Tex. Aug. 26, 2009).

Because Plaintiffs' amended pleading superseded their original pleading, on which Defendants' Motions to Dismiss were based, the undersigned RECOMMENDS that Defendants' Motions to Dismiss (ECF Nos. 5 and 12) be DENIED without prejudice as MOOT.

A copy of this findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b)(1). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc).

Signed March 21, 2017.



Hal R. Ray, Jr.
UNITED STATES MAGISTRATE JUDGE

¹ The Court suggests no view on the merits of the Amended Complaint or whether it is subject to dismissal under Rule 12(b)(6).